Supreme Court, U.S.
FILED

No. _____ 05 159 AUG 1 - 2005

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In The

Supreme Court of the United States

KATHLEEN INEZ NOVAK,

Petitioner,

vs.

ESTATE OF FRANKIE NOVAK, Incapacitated Person,
by and through SHARON VEST,
Guardian and Conservator,

Respondent.

On Petition For A Writ Of Certiorari
To The Alabama Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. PETITIONER (THE WIFE) WAS DENIED DUE PROCESS OF LAW BY NOT BEING AFFORDED THE OPPORTUNITY FOR AN EVIDENTIARY HEARING AND A PSYCHOLOGICAL EVALUATION OF THE WARD (THE HUSBAND) BEFORE THE MOBILE COUNTY PROBATE COURT AUTHORIZED THE FILING OF A DIVORCE PETITION ON BEHALF OF THE WARD. THE INSTITUTION OF MARRIAGE IS CLEARLY MARKED WITH THE PUBLIC INTEREST AND CANNOT BE DISSOLVED EXCEPT BY DUE JUDICIAL PROCEEDINGS.

II. THE MOBILE COUNTY, ALABAMA PROBATE COURT DID NOT HAVE AUTHORITY UNDER THE ALABAMA UNIFORM GUARDIANSHIP ACT, CODE OF ALABAMA 1975, SECTION 26-2A-108 TO ALLOW THE GUARDIAN TO PETITION FOR DIVORCE ON BEHALF OF THE WARD. THEREFORE, PETITIONER WAS DENIED DUE PROCESS OF LAW BECAUSE A PLAIN READING OF THE STATUTE DOES NOT EVEN ADDRESS THE POSSIBILITY OF THE GUARDIAN'S POWER TO PETITION FOR DIVORCE ON BEHALF OF THE WARD.

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PERIODICAL(S):

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OPINIONS BELOW

On September 5, 2003, Sharon Vest, acting as conservator/guardian for Frankie Novak, filed a petition for annulment of marriage in Mobile County Circuit Court. Thereafter, in March 2004, Sharon Vest, conservator/guardian, amended the petition for annulment and requested the Mobile County Circuit Court enter a divorce decree, divorcing Petitioner and Frankie Novak. *See Mobile County Circuit Court (Domestic) Case Action Summary Sheet appended hereto as Appendix "D."*

On May 28, 2004, Petitioner filed an emergency petition in the Mobile County Probate Court to enter an order requiring Sharon Vest, guardian/conservator, to withdraw and cease from attempting to obtain a divorce decree. Petitioner also filed an emergency petition to clarify visitation, limit the actions of the guardian/conservator, and make Frankie Novak, the alleged incapacitated person, available for evaluation. *See Mobile County Probate Court Case Action Summary Sheet appended hereto as Appendix "E."*

On June 9, 2004, with no evidentiary hearing or opportunity to evaluate Frankie Novak, the Mobile County Probate Court Ordered that "the conservator is authorized to proceed with the divorce proceedings for said ward in the Domestic Court of Mobile County, Alabama." *See Mobile County Probate Order appended hereto as Appendix "B."* Petitioner then filed a written notice of appeal on or about July 1, 2004.

The Alabama Supreme Court affirmed the Order issued by the Mobile County Probate Court with no opinion. *See Alabama Supreme Court holding appended hereto as Appendix "A."* Petitioner subsequently sought an

application for rehearing in the Alabama Supreme Court. The application for rehearing was overruled on June 10, 2005. *See Alabama Supreme Court Order appended hereto as Appendix "C."*

STATEMENT OF JURISDICTION

The Mobile County Probate Court had jurisdiction over this case pursuant to Code of Alabama 1975, Section 12-13-1. An appeal was taken pursuant to Code of Alabama 1975, Section 12-22-20 to the Alabama Supreme Court of the Mobile County Probate Court's order. The final order from the Alabama Supreme Court was issued on June 10, 2005. This Court's jurisdiction is invoked by timely filing of Petitioner's Writ of Certiorari to the United States Supreme Court pursuant to 28 U.S.C.A. § 1257.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

FIFTH AMENDMENT

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

FOURTEENTH AMENDMENT

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

CODE OF ALABAMA 1975, SECTION 26-2A-108

Except as limited pursuant to Section 26-2A-105(c), a guardian of an incapacitated person is responsible for health, support, education, or maintenance of the ward, but is not liable to third persons by reason of that responsibility for acts of the ward. In particular and without qualifying the foregoing, a guardian has the same duties, powers and responsibilities as a guardian for a minor as described in Section 26-2A-78(b), (c) and (d).

CODE OF ALABAMA 1975, SECTION 26-2A-78(b-d)

(b) In particular and without qualifying the foregoing, a guardian shall:

(1) Become or remain personally acquainted with the ward and maintain sufficient contact with the ward to know of the ward's capacities, limitations, needs, opportunities, and physical and mental health;

(2) Take reasonable care of the ward's personal effects and commence protective proceedings if necessary to protect other property of the ward;

(3) Apply any available money of the ward to the ward's current needs for health, support, education, or maintenance;

(4) Conserve any excess money of the ward for the ward's future needs, but if a conservator has been appointed for the estate of the ward, the guardian, at least quarterly, shall pay to the conservator money of the ward to be conserved for the ward's future needs; and

(5) Report the condition of the ward and of the ward's estate that has been subject to the guardian's possession or control, as ordered by the court on petition of any person interested in the ward's welfare or as required by court rule.

(c) A guardian may:

(1) Receive money payable for the support of the ward to the ward's parent, guardian, or custodian under the terms of any statutory benefit or insurance system or any private contract, devise, trust, conservatorship, or custodianship, and money or property of the ward paid or delivered pursuant to Section 26-2A-6;

(2) If consistent with the terms of any order by a court of competent jurisdiction relating to detention or commitment of the ward, take custody of the person of the ward and establish the ward's place of abode within or without this state;

(3) If no conservator for the estate of the ward has been appointed, institute proceedings,

including administrative proceedings, or take other appropriate action to compel the performance by any person of a duty to support the ward or to pay sums for the welfare of the ward;

(4) Consent to medical or other professional care, treatment, or advice for the ward without liability by reason of the consent for injury to the ward resulting from the negligence or acts of third persons unless a parent would have been liable in the circumstances;

(5) Consent to the marriage or adoption of the ward; and

(6) If reasonable under all of the circumstances, delegate to the ward certain responsibilities for decisions affecting the ward's well-being.

(d) A guardian is entitled to reasonable compensation for services as guardian and to reimbursement for room, board and clothing personally provided to the ward, but only as approved by order of the court. If a conservator, other than the guardian or one who is affiliated with the guardian, has been appointed for the estate of the ward, reasonable compensation and reimbursement to the guardian may be approved and paid by the conservator without order of the court controlling the guardian.

CODE OF ALABAMA 1975,
SECTION 26-2A-136

(a) The court shall exercise the authority conferred in this division to encourage the development of maximum self-reliance and independence of a protected person and make protective orders only to the extent necessitated by the protected person's mental and adaptive limitations and other conditions warranting the procedure.